United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1948

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH W. HALEY and HENRY WHITNEY, as Trustees of the International Association of Bridge, Structural and Ornamental Iron Workers, Local 417 Training and Education Fund,

Appellants,

—against—

ROBERT PALATNICK and JOSEPH ALBENDA, Trustees of the International Association of Bridge, Structural and Ornamental Iron Workers, Local 417 Training and Education Fund,

—and—

WILLIS C. ROSE, individually,

Appellees.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE WILLIS C. ROSE

GRANIK, GARSON, SILVERMAN & NOWICKI
Attorneys for Appellee,
Willis C. Rose
120 North Main Street
New City, New York 10956
(914) 634-8822

DAVID W. SILVERMAN
Of Counsel

3

INDEX

Table of Authorities

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1948

JOSEPH W. HALEY and HENRY WHITNEY, as Trustees of the International Association of Bridge, Structural and Ornamental Iron Workers, Local 417 Training and Education Fund,

Appellants,

—against—

ROBERT PALATNICK and JOSEPH ALBENDA, Trustees of the International Association of Bridge, Structural and Ornamental Iron Workers, Local 417 Training and Education Fund,

—and—

WILLIS C. ROSE, individually,

Appellees.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE WILLIS C. ROSE

Introduction

Appellants appeal from the order of the District Court for the Southern District of New York (MacMahon, D.J.) filed on June 13, 1974, which dismissed their action for declaratory judgment (74 Civ. 284).

Facts

The District Court's opinion (Appendix, pp. 50-54) adequately sets forth the factual context of this case.

Defendant-Appellee's Position

Payment by the Unions' Training and Education Fund to Willis C. Rose (Appellee here) for his services as administrator did not violate section 302 of the Labor-Management Relations Act (29 U.S.C. §186).

Rebuttal Argument

The question at bar is whether the District Court's interpretation of section 302(c)(6) of the Labor Management Relations Act 29 U.S.C. §186[c][6]), as applied to the facts of this case, was correct. In its opinion (Appendix, pp. 49-68) the District Court held that the conduct of the Appellee Rose (hereafter "Rose") did not fall within the reach of the cited section; consequently, it dismissed appellants' complaint (App. pp. 67-68).

I

Section 302 and its sub-parts give remedial expression to Congressional fears that

> "if (union) welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. . . . (citations omitted). To remove these dan-

gers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established" (*Arroyo* v. *United States*, 359 U.S. 419, 426).

Excepted from the ambit of proscribed activities in this sphere is the payment by an employer:

"to a trust fund established . . . for the purpose of . . . defraying costs of apprenticeship or other training programs" (29 U.S.C. §186[c][6]).

Rose, by virtue of his employment as the administrator of the International Association of Bridge, Structural and Ornamental Iron Workers, Local 417 Training and Education Fund (hereafter, "Fund") is said to have breached the proscriptions of the federal statute by accepting a salary and expense reimbursement from the Fund in return for his administrative services. Appellants contend that Rose became the Fund administrator through his fraud, duress, coercion and similar evil practices designed to benefit himself at the expense of the Fund with the approval of the paying employer. Appellants further contend that the District Court's findings support invocation of the cited statute to strike down Rose's employment contract and order civil restraint of its enforcement. It is urged that the District Court erred in unduly stricturing its interpretation of the statute as to exclude therefrom Rose's conduct in accepting salary and expense reimbursement from the Fund. This conduct, appellants say, amounts to proscribed receipt by a union representative of employer payments (29 U.S.C. §186[b][2]), and gives rise to the remedy provided in subsection "E" of the statute (29 U.S.C. §186[e]).

This Court must now distinguish between the law as it is and the law which appellants would prefer. That "there oughta be a law" is no predicate upon which to fashion declaratory relief. The responsibility of making the law resides with the Congress; the court must declare as the law only that which Congress gives it. And that is precisely what the District Court has done in this case.

II

An analysis of the opinion below rebuts the thrust of appellants' suggestion that "the Court below broke step with its own syllogism" (App. Br. p. 10). The District Court found "no evidence . . . which shows that Rose . . . attempted to use the structure of the Fund to disguise or facilitate direct or indirect employer payments to Rose" (Appendix, opinion, p. 66). Indeed, the record speaks for itself on this subject. Admittedly, Rose did receive payment for his services to the Fund. These payments were made by the Fund, not by the "employer." Moreover, the administrator (Rose) served the interests of the union's apprentice-trainees, not those of the "employer," as will be be borne out by the record at bar (Rec. 63, 64, 65), as well as Rose's records of work performed as set forth in defendant's Exhibit "A" for identification (Rec. 83, 84). There is no evidence from which the Court may infer that Rose abused his position of trust or acted inimically to the interests of the trainees for the benefit of the employer within the meaning of §302. In this regard, it is well to reflect on the purpose of section 302 of the Labor Management Relations Act in its broadest aspect. That view is adequately professed by the United States Supreme Court in *Arroyo* v. *United States* (359 U.S. 419, 424-426; and see, Annot., validity, construction and application of §302[a-d] of Labor Management Relations Act, 3 L. Ed. 2d 1942).

It is *the use, directly or indirectly,* of the Fund moneys for any purpose other than that which would benefit the employee-members of the *union* which the Court has power to enjoin under §302[e] (*Upholsterer's International Union of North America* v. *Leathercraft Furniture Co.*, 82 F. Supp. 570 [D.C. Penna.]). Here, the District Court found as fact that such use did *not* occur (Opinion, App. p. 66). Absent such abuse, which is the real target of §302's thrust, there is no viably stated federal claim thereunder and the action was properly dismissed therefor.

Again, absent the *state* claim with respect to the alleged breach of Rose's fiduciary duty, there is no pendent jurisdiction for the court to act upon. Since appellants' sole claim here relates to the reach of §302[c][6], the findings of the District Court respecting breach of fiduciary duty are not the subject of review on this appeal in the vacuum created by lack of pendent jurisdiction.

III

A word must be said concerning appellants' reference to the new "Employee Retirement Income Security Act of 1974" with respect to fiduciary standards (App. Br. p. 12). It is significant to note that section 402(c)(1) thereof expressly *permits* "Any person . . . [to] serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator)." Thus, the mere fact that Rose was a trustee of the union and administered the apprentice-training fund would not be, even in the context of new legislation, sufficient to place Rose in the "off-limits" area defined by the Congress with respect to union pension plans. As the District Cout found, "there was no evidence that the kind of bribery and extortion

congress sought to prevent when it passed the Act was present here" (App. opinion, p. 67). The crux of this case was aptly summed up in the following quotation from the Court's opinion (*id.*):

> "The evidence does not show that Rose, the prime mover in acquiring the administrator's job for himself, made any threats or promises to either of the employer trustees to induce them to sign the contract [appointing Rose as administrator], or that they demanded or expected anything in return for their signatures. The trustees' conduct constituted no more than a simple breach of their fiduciary duty to the Fund, conduct which does not come within §302 of the Act and which presents an issue not now before us." *

This Court will surely see the wisdom inherent in the District Court's distinction of the facts present and the propriety of its interpretation of the law applicable thereto. If the facts of *Arroyo* v. *United States* (359 U.S. 419) were found insufficient to invoke §302's criminal sanctions, there can be no doubt that the District Court's holding in the case at bar was eminently correct.

---

* Though Rose is in whole-hearted disagreement with the statement of the trial court that the Trustees breached a Fiduciary duty in his being hired, the legal import of the decision remains unchanged. Rose submits that with respect to the statement concerning breach of fiduciary duty there is not a single fact in the record to support the conclusion. In Mr. Rose's state lawsuit for breach of contract, appellants have answered and counterclaimed alleging breach of fiduciary duty on the part of the trustees. That matter has been stayed in view of the present proceedings. Rose intends to challenge the counterclaim as specious. (The matter is pending in Supreme Court, Rockland County.)

CONCLUSION

The District Court's order dismissing the complaint should be affirmed.

Respectfully submitted,

GRANIK, GARSON, SILVERMAN & NOWICKI
Attorneys for Appellee,
Willis C. Rose
120 North Main Street
New City, New York 10956
(914) 634-8822

DAVID W. SILVERMAN
Of Counsel

Service of ~~three~~ TWO (2) copies of the within BRIEF is admitted this 6th day of NOV. 1974

John R. Hall

ATTORNEY FOR APPELLANT

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775